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In the Supreme Court of the United States

OCTOBER TERM 1954

No. 248

UNITED STATES OF AMERICA, PETITIONER

v.

NORTON CLAPP

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above case on January 5, 1954.

OPINION BELOW

The opinion of the Court of Claims (R. 219)[1] is not yet reported but is set out in the Appendix, *infra* pp. 21–32.

JURISDICTION

The judgment of the Court of Claims was entered on January 5, 1954 (R. 226), and a timely motion for rehearing was denied on April 6, 1954 (R. 247). On June 25, 1954, by order of the Chief Justice, the time for filing a petition for a writ

[1] References are to the certified transcript of the record in the court below, filed with the Clerk pursuant to Rule 21 (1) of the Rules of this Court.

of certiorari was extended to and including July 30, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

The Shipping Act of 1916 provides that no ship acquired from the Maritime Administration may be transferred to an alien without the approval of the Administration, and that "such approval may be accorded * * * upon such conditions as the [Administration] prescribes." Respondent applied for approval of a sale to an alien of a vessel recently sold by the Administration, and the Administration granted approval on the condition that respondent pay $7,500 to the United States. Respondent paid that sum, transferred the ship to the alien, and then brought suit in the Court of Claims to recover the $7,500. The questions presented are:

1. Whether the Court of Claims could properly hold the condition unauthorized and order repayment of the money without affording the Administration an opportunity to determine whether the approval should be granted without the condition.

2. Whether the respondent, having availed himself of the benefit of the administrative action, is estopped to attack the validity of the condition.

3. Whether monetary conditions are authorized by the statute.

4. Whether the Court of Claims has jurisdiction of an action to recover money exacted by an administrative agency under color of a statutory authorization.[2]

STATUTE INVOLVED

The pertinent provisions of the Shipping Act of 1916, 39 Stat. 730, 40 Stat. 902, as amended, 46 U. S. C. 808, 839, read as follows:

> Sec. 9. Any vessel purchased, chartered, or leased from the Secretary of Commerce, by persons who are citizens of the United States, may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: * * *
>
> Every vessel purchased, chartered, or leased from the Secretary shall, unless otherwise authorized by the Secretary, be operated only under such registry or enrollment and license. * * *
>
> Except as provided in section 611 of the Merchant Marine Act, 1936, as amended, it shall be unlawful, without the approval of the Secretary of Commerce, to sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell,

[2] The first, second, and fourth questions are comparable to the second, third, and fourth questions presented in the Government's petition in *United States* v. *Southeastern Oil Florida, Inc.*, No. 27, this Term, p. 3, which is being filed herewith.

> mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States * * * any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States * * *.
>
> * * * * *
>
> Sec. 41. Whenever by said section nine or thirty-seven the approval of the Secretary of Commerce is required to render any act or transaction lawful, such approval may be accorded either absolutely or upon such conditions as the Secretary prescribes. * * *

STATEMENT

In January 1948, the United States Maritime Commission sold the 2,550-ton passenger-cargo vessel S. S. *Empire Consequence* to the Alaska Transportation Company, a corporation of which the respondent was president, majority stockholder, and principal creditor (R. 2–3, 17). The sale was made through advertising and sealed bids; the invitation to bid was limited to citizens of the United States (R. 2, 11, 12). The sale price was $110,450.00 (R. 2, 18), and the Alaska Transportation Company invested some $227,276.79 in converting the vessel for use in the Alaska trade (R. 3).

In July 1949, the respondent acquired the ship from the corporation, in consideration of his

cancellation of an indebtedness of the corporation to him of $319,725.64, the book value of the vessel on the company's books (R. 4). In May 1951, the respondent entered into a contract to sell the ship to a Finnish corporation, Etela-Suomen Laiva Oy of Helsinki, Finland, for a price of $325,000, subject to the approval of the Maritime Administration,[3] such approval being required by Section 9 of the Shipping Act of 1916, *supra,* pp. 3–4, for the sale of an American ship to an alien (R. 4, 25–32). The contract recited that the parties were aware that foreign transfer could not be made unless approved by the Maritime Administration, and provided: "[I]f approval by the United States of America authorities of this proposed sale and transfer is not obtained within a reasonable time, then in that event this agreement shall be null and void * * *" (R. 25, 26).

Pursuant to the contract, the respondent, on or about May 15, 1951, applied to the Maritime Administration for approval of the sale (R. 5). On July 19, 1951, the secretary of the Maritime Administration wired the respondent that it would approve the sale on condition that, before the issuance of a formal order of approval, the respondent pay the Maritime Administration

[3] In 1950, the Secretary of Commerce, through the Maritime Administration, succeeded to the functions, including that of approving transfers, that formerly resided in the Shipping Board and the Maritime Commission. 15 F. R. 3178; 64 Stat. 1276, 1277.

$7,500 "as consideration for release of obligation to operate vessel under United States laws" (R. 32–33).[4] Within a week respondent paid the $7,500, accompanying the payment with a statement that if it should develop that the monetary exaction was unauthorized by law he would expect to be "protected with respect to the payment" (R. 7, 34). The Administration then issued a transfer order approving the sale, and the sale was consummated (R. 34–35). Thereafter, the respondent applied to the Administration for a refund of $7,500, contending that the exaction was unauthorized; and when his application was denied he brought this action (R. 35–53).

In the court below, both parties moved for summary judgment. The Government contended that the court had no jurisdiction of the action, the only possible statutory basis for jurisdiction, i. e., "an action for * * * damages, not sounding in tort", being foreclosed because respondent had predicated his claim upon economic duress and the claim therefore sounded in tort. The Government also contended that the condition imposed by the Maritime Administration was authorized by the broad

[4] Section 9 of the Shipping Act, *supra*, p. 3, requires that, unless otherwise authorized by the Maritime Administration (as delegate of the Secretary of Commerce), all vessels purchased from the Administration must be operated under United States laws.

language of Section 41 of the Shipping Act, *supra*, p. 4, which states that the Administration's approval of sales to an alien "may be accorded either absolutely or upon such conditions as the [Administration] prescribes"; and that, in any event, the respondent, having accepted the benefits of the administrative action, was estopped to deny the validity of the condition.

These contentions the Court of Claims rejected. It held that it had jurisdiction over the action as an action "founded upon an Act of Congress" (R. 220–225; App. 23–30), rejecting the contention that the action sounded in tort, despite a conflict, which the court recognized (R. 224; App. 29), between this holding and that of *United States* v. *Holland-America Lijn*, 254 U. S. 148. It then went on to hold that Section 41 of the Shipping Act, despite its unrestricted terms, did not authorize the imposition of pecuniary conditions upon the Administration's approval of transfers to aliens (R. 225–6; App. 30–32). The Government's estoppel contention the court rejected summarily (R. 226; App. 32). Accordingly, it granted a summary judgment for the respondent in the amount of $7,500 (R. 226; App. 32).

REASONS FOR GRANTING THE WRIT

In this case, as in *United States* v. *Southeastern Oil Florida, Inc.*, No. 44, the Court of Claims has combined three significant deviations

from accepted general principles so as to bring under its scrutiny an administrative determination with which it should have no concern and to grant an undeserved special advantage to persons dealing with the United States. First, the court excised an important condition imposed by the Maritime Administration on its statutory approval of a foreign sale, and then exercised judicial judgment that the administrative authorization should stand without the condition administratively imposed. Second, the beneficiary of a conditional administrative award was permitted to attack the condition while retaining the full benefit of the agency's action. And, third, the court enlarged its own jurisdiction, contrary to past holdings, to include all actions to recover sums paid to Government officials under color of statutory authorization. Each of these rulings is separately important; together they merge into a decision which plainly merits and calls for review by this Court.

1. Sections 9 and 41 of the Shipping Act of 1916 (*supra,* pp. 3–4) place in the Maritime Administration the responsibility of determining whether a proposed transfer to a foreigner of an American-owned and registered merchant ship, originally purchased from the Administration, is consonant with the national commercial and foreign policy embodied in our shipping laws. Basic to that policy is the desire of Congress to insure that the merchant fleet operating under the

American flag is adequate to carry the foreign commerce of the United States and to be available for the national defense in case of emergency. In this case, the Administration, utilizing its statutory power to prescribe conditions (Section 41, *supra,* p. 4), has determined that the transfer of the *Empire Consequence* to Finnish registry would be consistent with the national maritime policy if the respondent were required to pay the sum of $7,500 to the United States as a condition to making the transfer. *Supra,* pp. 5–6. The Administration, which specifically referred to the obligation to operate the vessel under American laws (*supra,* p. 6), may have been of the view that this monetary requirement was essential for any of several reasons. One ground was that in carrying out the policy of the shipping laws at the time of its sale of the vessel to the respondent's assignor, the Alaska Transportation Company, it had restricted the bidding to Americans; therefore, it had received less money than it could reasonably have expected if it had opened the bidding to the whole world. Another reason may have been the Administration's view that, in conformity with Congress's policy of preferring American ownership, it should impose some financial burden upon transfers to alien ownership, in order to make it less profitable (other things being equal) for sellers to sell to aliens rather than to Americans.

By awarding the respondent a refund of the amount required as a condition to the Administration's approval of the transfer, the Court of Claims has in effect compelled the Administration to approve the transfer without the condition attached. Yet the Administration has not determined, and has not had the opportunity to determine, whether the sale of the vessel would be consistent with the policy of the shipping laws if this significant condition were eliminated. And the principle has been reiterated in numerous decisions of this Court that, where Congress has reposed jurisdiction to make a policy determination in an administrative agency, the courts may not interpose their own judgment but must leave the matter to the agency, informed by its particular experience and mission. This principle was most recently applied by this Court in the closely comparable case of *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 21, where it was held that it was for the Commission, not the reviewing court, to determine whether the objectives of the licensing portion of the Federal Power Act could be achieved if certain contested conditions of the license were stricken by the court.[5]

This rule of respect for the different functions of administrators and courts is peculiarly appro-

[5] Accord: *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 55; *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 612–614; *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 618–619; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145; *Tank Car Cor-*

priate for the Court of Claims, which lacks the power of direct review of decisions by administrative agencies, does not decide on the basis of an administrative record, cannot remand a case to the agency for further consideration, cannot modify the agency's order except by the indirect and hit-or-miss means of granting a money judgment against the United States, and cannot enter the orders against the plaintiff which may be necessary. Cf. *United States* v. *Jones,* 336 U. S. 641, 652–653, 670–671, 672–673, ruling the Court of Claims incompetent to review or revise railway mail pay orders and findings of the Interstate Commerce Commission. A *de novo* proceeding for a money judgment against the United States does not lend itself to the limited supervision which is the sole role of the federal courts with respect to administrative determinations. On the other hand, this Court has made it clear that substitution of judicial judgment for that of the administrator is wholly inadmissible, particularly in the alien fields of commercial and foreign policy. *Supra,* pp. 10–11. It seems plain, therefore, that, since there was no power to remand the case to the Administration or to com-

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poration v. *El Dorado Terminal Co.*, 308 U. S. 422, 432–433; *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 373–374; *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation District*, 304 U. S. 295, 301; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 218; *Southern Ry. Co.* v. *Tift*, 206 U. S. 428, 437–438; *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 444, 448; cf. *Far East Conference* v. *United States*, 342 U. S. 570, 574–5.

pel the respondent to restore the *status quo ante,* the Court of Claims should have refused to entertain the action—at least until it could be made clear that the Administration would approve the sale without the contested condition. Instead, the court has reached out to reject administrative action and to replace the agency's determinations by its own. See also, the Government's petition in *United States* v. *Southeastern Oil Florida, Inc.,* No. 247, this Term, pp. 22–23.

2. In addition, by allowing the respondent to attack the condition at a time when it was beyond his power to restore the *status quo* by recovering the vessel, and in the face of his unwillingness to do so, the court (as in *United States* v. *Southeastern Oil Florida, Inc.,* No. 247 (see the Government's petition, pp. 20–22)), violated another established principle—that a party who accepts the benefit of an administrative decision and puts it into effect, to his own advantage, cannot thereafter deny the validity of the conditions imposed on him by the decision. This principle the court below rejected as being "beneath the dignity of the Government" (R. 226; App. 32). But this Court has many times recognized the same rule in holding that a party may not retain benefits conferred by a statute while attacking the constitutionality of one of its conditions. *E. g., Fahey* v. *Mallonee,* 332 U. S. 245, 255; *United States* v. *San Francisco,* 310 U. S. 16, 29; *United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S.

300, 307–308; *Booth Fisheries* v. *Industrial Commission,* 271 U. S. 208; *Buck* v. *Kuykendall,* 267 U. S. 307, 316; *St. Louis Malleable Casting Co.* v. *George C. Prendergast Construction Co.,* 260 U. S. 469; *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407, 411–412; *Shepard* v. *Barron,* 194 U. S. 553; *Grand Rapids and Indiana Railway Co.,* v. *Osborn,* 193 U. S. 17, 29; *Daniels* v. *Tearney,* 102 U. S. 415, 421. And the Court has recently extended the rule of these cases, dealing with statutes and local ordinances, to cases treating with the statutory validity of administrative awards. *Callanan Road Co.* v. *United States,* 345 U. S. 507, 513. In the present circumstances, this often-stated principle is supported by the evident unfairness of allowing the respondent to retain all the benefits of a profitable bargain, while recovering the consideration paid as his part of the bargain and without which the Maritime Administration may well have refused to permit the transaction.[6]

3. What we have said indicates the significant error of the decision below, apart from the question whether the Maritime Administration was authorized to attach a pecuniary condition to its approval of the sale. In our view, however, the Administration's action was fully authorized and the Court of Claims has imposed an unwarranted

[6] The respondent's attempted protest is of no avail, since he continues to retain the benefits of the transaction.

limitation on the Congressionally conferred power of the Administration to control the American-owned merchant fleet, particularly that large segment of it which has been acquired from the Government.[7] The Court of Claims' basic view was that Section 41 did not warrant the imposition of *any* financial condition (R. 226; App. 31–32), despite the section's unrestricted language, which states that approval may be accorded "either absolutely or upon such conditions as the [Administration] prescribes". *Supra,* p. 4. These sweeping words, read literally or in context, do not permit the carving out of an exception for money payments, and certainly the Administration could condition its approval of foreign transfers upon payment by the foreign purchaser of the cost of national defense features incorporated in the vessels sold or could demand as a prerequisite to approval of foreign transfers of ships sold under the Merchant Ship Sales Act of 1946 (60 Stat. 41, as amended, 50 U. S. C. App. 1735) that the American owners abandon their claims for "class" allowances under the Ship Sales Act.[8]

[7] The importance of the requirement that these vessels be retained in American hands, unless approval for a foreign sale is obtained, is reflected in the current tanker controversy, aspects of which are before the Court in *Meacham Corp.* v. *United States*, pending on writ of certiorari, No. 26, this Term.

[8] Under the Ship Sales Act, the Maritime Administration was required, in sales to citizens, either to put the vessels "in class" or to grant an allowance for this purpose. See the Government's petition for a writ of certiorari in *United*

The particular money payment required in this case is squarely within the broad language of Section 41, appropriate to the objectives sought to be obtained by requiring Maritime Administration approval of these foreign sales, and wholly consonant with the general policy of the shipping laws. The vessel had but recently been purchased from the Government, and it was a plain condition of that sale, binding on respondent as well as his predecessor in title, that a later foreign transfer would require Administration appraisal which would be given absolutely or on condition. As we have suggested, *supra,* p. 9, the condition imposed afforded the Maritime Administration the opportunity to recoup losses sustained as a result of its having limited the bidding for ships to American citizens, and also provided a means whereby the Administration could make it more profitable for American owners to sell to Americans rather than to aliens.[9] The condition was therefore far from arbitrary, and the Court of

States v. *Southeastern Oil Florida, Inc.*, No. 47, this Term, pp. 5–6. There was no such requirement on sales to foreigners. In several instances the Administration sold to citizens who planned to resell to foreigners; the purchasers agreed to forego the "class" requirement in return for the Administration's approval of the foreign transfers.

[9] Since the Court of Claims decided the case on motions for summary judgment, the Government was unable to present evidence supporting the reasonableness, from the viewpoint of the Maritime Administration, of the condition imposed on its approval of respondent's foreign sale.

Claims should not have substituted its appraisal of the worth of the requirement for that of the Administration in which Congress has lodged the duty and the responsibility. See *supra,* pp. 10–11.[10]

4. The Court of Claims also erred, in a significant holding, in taking jurisdiction of this case under its fundamental charter (28 U. S. C. 1491).[11] The Government urged that the only possible basis of jurisdiction of this case under that statute was as a claim "for liquidated or unliquidated damages in cases not sounding in tort" (28 U. S. C. 1491 (5), *supra,* fn. 11), and that under the controlling decision of *United States* v. *Holland-America Lijn,* 254 U. S. 148, this basis was excluded because the action sounded in tort. In that case, the Holland-America Line

[10] We are advised by the Maritime Administration that there are several instances of conditions just like the present one, and a larger number of potential claims (on some of which suit has already been brought) involving abandonment of "class" allowances under the Ship Sales Act of 1946. See fn. 8, *supra,* pp. 14–15.

[11] 28 U. S. C. 1491 reads as follows:

"*Claims against United States generally*

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

"(1) Founded upon the Constitution; or

"(2) Founded upon any Act of Congress; or

"(3) Founded upon any regulation of an executive department; or

"(4) Founded upon any express or implied contract with the United States; or

"(5) For liquidated or unliquidated damages in cases not sounding in tort."

brought suit alleging that, under pain of threatened detention of its vessels, it was compelled to pay bills rendered by the immigration authorities under color of the Immigration Act for maintenance and care of immigrants who, after leaving the company's ships, were temporarily detained before being admitted to this country. The claimed reimbursement was on the ground that the exactions were not authorized by the Immigration Act. This Court held that the claim, being predicated upon duress imposed by the unauthorized action of the administrative authorities, was a claim for damages sounding in tort and beyond the competence of the Court of Claims.

The *Holland-American Lijn* decision is on all fours with the present case. The respondent, too, predicated his claim upon alleged duress, and contended that he was forced to pay the unauthorized amount charged by the Maritime Administration on pain of being compelled to break his contract with the Finnish purchaser. The Court of Claims did not deny that, if *Holland-America Lijn* governed, there would be no jurisdiction (R. 224; App. 29). But it appears to be of the view that that decision is contrary to the main course of development in this field and should therefore not be followed. In these circumstances, review is plainly warranted;

if the *Holland-America* case is to be overturned it should be by this Court, which decided it.[12]

Moreover, it does not seem that the course of development is as clear as the court below thought it to be. The opinion cites eight cases. Of these, four (*Cohens* v. *Virginia,* 6 Wheat. 264; *Dooley* v. *United States,* 182 U. S. 222; *United States* v. *Emery, Bird, Thayer Realty Co.,* 237 U. S. 28; and *Christie-Street Commission Co.* v. *United States,* 136 Fed. 326 (C. A. 8)), antedate the *Holland-American* decision. Of the remaining four, only one, *Keifer & Keifer* v. *Reconstruction Finance Corporation,* 306 U. S. 381, is a decision of this Court, and that case, dealing with the question whether a corporate subsidiary of the Reconstruction Finance Corporation had been clothed with the sovereign immunity of the United States, is far removed from this.[13]

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[12] The *Holland-America Lijn* case has recurring significance in Tucker Act litigation. See, *e. g., Pan American World Airways* v. *United States,* C. Cls. No. 221–53, decided July 13, 1954, a case substantially identical with *Holland-America* in which the Court of Claims, noting its disagreement with this Court's decision, again took jurisdiction (though it decided in the Government's favor on the merits). See also the Government's petition in *United States* v. *Southeastern Oil Florida, Inc.,* No. 147, this Term, pp. 23–24.

[13] Of the remaining three lower court decisions cited by the court below, *Compagnie General Transatlantique* v. *United States,* 21 F. 2d 465 (S. D. N. Y.), was a district court opinion of Judge Augustus Hand. On appeal, the Court of Appeals for the Second Circuit refused to adopt the dictum of Judge Hand, quoted by the court below, and found it necessary expressly to distinguish *United States v. Holland-America Lijn, supra. United States* v. *Compagnie Generale Transatlantique,* 26 F. 2d 195, 197–198 (C. A. 2). *Carriso, Inc.* v.

The Court of Claims also suggested that a basis of jurisdiction might be found in the provision for actions "founded upon any Act of Congress" (28 U. S. C. 1491 (2), *supra,* fn. 11, p. 16). But it is settled that an action does not "arise under" an act of Congress unless it appears from the facts properly pleaded in the complaint or petition that a construction of the Act of Congress will necessarily be involved. E. g., *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U. S. 667; *Gully* v. *First National Bank,* 299 U. S. 109; *Taylor* v. *Anderson,* 234 U. S. 74, 75–76; *Louisville & N. R. R.* v. *Mottley,* 211 U. S. 149; *Tennessee* v. *Union & Planters' Bank,* 152 U. S. 454.[14] This case does not meet that test. The gravamen of the complaint was that the Maritime Administration had wrongfully exacted from the respondent money that he was entitled to recover back. In defense, the Government attempted to justify under Sections 9 and 41 of the Shipping Act, *supra,* pp. 3–4. This brought into issue the proper construction of the legislation, but only

United States, 106 F. 2d 707 (C. A. 9) and *Ross Packing Co.* v. *United States*, 42 F. Supp. 932 (E. D. Wash.) are clearly not in point.

[14] It is also settled that there is no distinction between the term "arising under" for purposes of 28 U. S. C. 1331, relating to the jurisdiction of the District Courts, which the cited cases construe, and the term "founded upon," for the purposes of the Court of Claims' statute. *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 32. And see *Roden Coal Co.* v. *United States*, 95 C. Cls. 219, 231, certiorari denied, 317 U. S. 636.

as a matter of defense; the Government might never have pleaded the statute or might have sought to justify on other grounds. Under the established rule, a defense raising the construction of an Act of Congress does not bring a case within the category of cases "arising under" or "founded upon" an Act of Congress, even where that defense is anticipated by the complaint or petition. The Court of Claims' misconstruction, involving its own jurisdictional statute and also bearing directly upon a sensitive area of District Court jurisdiction, merits review and correction.[15]

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

JULY 1954.

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[15] In addition to the jurisdictional barrier, the respondent should have been foreclosed by the rule that, in the absence of a specific statute, persons voluntarily paying money to the Government cannot recover it back. *United States* v. *Edmondston*, 181 U. S. 500; *Miller* v. *United States*, 42 C. Cls. 121.

APPENDIX

APPENDIX

The opinion of the Court of Claims is as follows:

In the United States Court of Claims

No. 314–52

(Decided January 5, 1954)

NORTON CLAPP

v.

THE UNITED STATES

Mr. C. F. Rothenburg for plaintiff. *Messrs. Charles D. Hamel, James P. Jones,* and *Hamel, Park & Saunders* were on the brief.

Mr. George S. Leonard, with whom was *Mr. Assistant Attorney General Warren E. Burger,* for defendant. *Mr. Donald D. Webster* was on the brief.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

MADDEN, *Judge,* delivered the opinion of the court:

The plaintiff was, in May 1951, the owner of a vessel, the steamship *Empire Consequence,* which he was anxious to sell, he having in 1949 taken the vessel in partial payment of a debt owed him by the Alaska Transportation Company, a corporation in which the plaintiff had been interested.

On May 2, 1951, the plaintiff entered into a contract to sell the vessel to a Finnish corporation for $325,000, subject to the approval of the sale by the United States Maritime Administration, as required by section 9 of the Shipping Act of 1916, as amended. On May 15 the plaintiff presented to the Maritime Administration his application for approval of the sale. The Maritime Administration thereupon requested the comments of the State Department, the Department of Defense, and the Office of International Trade, with regard to the proposed sale. In due course the Department of Defense replied that the proposed sale would not be harmful to the national defense, the State Department replied that it would not be inconsistent with the foreign policy of the United States and the Office of International Trade replied that the sale of the vessel for use in the Baltic trade would not adversely affect the foreign commerce of the United States.

The Maritime Administration concurred in the views of the other departments, and also determined that the vessel was not necessary to the United States merchant marine. It thereupon approved the plaintiff's application, but conditioned the approval upon the payment by the plaintiff to the Maritime Administration of $7,500 as "consideration for release of obligation to operate vessel under United States laws."

The plaintiff regarded himself as having become unconditionally obligated to the Finnish purchaser, by reason of the Maritime Administration's approval of his application. If he had refused to pay the $7,500, he would have, he

thought, been liable to the Finnish purchaser for breach of his contract of sale. He therefore paid the $7,500, advising the Maritime Administration that he did not understand why he had to pay it, and that he would expect to get it back if the law did not justify the charge. He thereupon completed the sale to the Finnish purchaser.

On October 11, 1951, the plaintiff filed a claim with the Maritime Administration for the refund of the $7,500 with interest. The claim was denied. He filed an application for reconsideration. It was denied. He appealed to the Secretary of Commerce, in whose Department the Maritime Administration was. The appeal was denied.

In this suit the plaintiff asserts that the Maritime Administration was not authorized to demand or receive the $7,500; that he paid the money involuntarily and under duress, and that he is entitled to its refund.

The Government asserts that this court does not have jurisdiction to entertain the suit. In the discussion of the question of jurisdiction, we assume that there was no legal authority in the Maritime Administration to demand or receive the $7,500. The plaintiff says that his claim is "founded upon an Act of Congress," and that we therefore have jurisdiction under 28 U. S. C. 1491 (2). The Government says that, assuming the illegality of the exaction, the claim is one sounding in tort, as to which 28 U. S. C. 1491 (5), denies our jurisdiction.

The vessel here in question had been purchased by the plaintiff's predecessor in title from the United States Maritime Commission in 1947. Section 9 of the Shipping Act of September 7, 1916,

46 U. S. C. 808, provides that a vessel so acquired cannot be sold to an alien without the approval of the Maritime Commission. Section 41 of the same statute, 46 U. S. C. 839, provides:

> Whenever by section 808 * * * of this title the approval of the Commission (Administration) is required to render any act or transaction lawful, such approval may be accorded either absolutely or upon such conditions as the Commission (Administration) prescribes.

This provision was the basis on which the Maritime Administration levied its charge upon the plaintiff, and is the basis on which the Government justifies the charge in this suit. The plaintiff asserts that this statutory provision does not authorize a money charge to be imposed as a condition upon the grant of permission to sell a ship to an alien purchaser. We are, in this discussion of the question of jurisdiction, assuming that the plaintiff is right in this regard. We have, then an assumed situation in which officials authorized by a statute to attach to their grants conditions other than money payments, misinterpret the statute to permit the imposition of a money charge which they collect and the Government keeps. Is the claim for the refund of the money unlawfully collected a claim "founded upon an act of Congress"?

In *Cohens* v. *Virginia,* 6 Wheat. 264, Chief Justice Marshall, in construing the Judicial Article of the Constitution and the 25th Section of the Judiciary Act said:

> A case in law or equity consists of the right of the one party, as well as the other, and may truly be said to arise under the

> constitution or a law of the United States whenever its correct decision depends on the construction of either.

The instant case, then, if we have jurisdiction to entertain it, would be a case "arising under a law of the United States." Is it a case "founded upon" a law of the United States?

In *Dooley* v. *United States,* 182 U. S. 222, Mr. Justice Brown said, for the court:

> In the cases under consideration the argument is made that the money was tortiously exacted; that the alternative of payment to the collector was a seizure and sale of the merchandise for the nonpayment of duties; and that it mattered not that at common law an action for money had and received would have lain against the collector to recover them back. But whether the exactions of these duties were tortious or not, whether it was within the power of the importer to waive the tort and bring suit in the court of claims for money had and received, as upon an implied contract of the United States to refund the money in case it was illegally exacted, we think the case is one within the first class of cases specified in the Tucker Act, of claims founded upon a law of Congress, namely, a revenue law, in respect to which class of cases the jurisdiction of the court of claims, under the Tucker Act, has been repeatedly sustained.

In *Christie-Street Commission Co.* v. *United States,* 136 Fed. 326, Judge Sanborn, for the Circuit Court of Appeals for the Eighth Circuit, considered in detail the pertinent decisions down to the year 1905, and followed what he concluded to be their trend. He said, (p. 331):

> It is said that there is a wide distinction between a claim which arises under, and one which is founded upon, a Constitution or a law. But after patient deliberation this distinction proves too subtle and elusive for the density of our perception. A claim is both founded upon, and it arises under, a provision of a Constitution or of a law which conditions and determines its validity. * * *.

In 1911 in *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, Mr. Justice Holmes said, for the Court:

> * * *. The jurisdiction over suits against the United States under Section 24 of the Judicial Code extends to "all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress." However gradually the result may have been approached in the earlier cases, it now has become accepted law that claims like the present are "founded upon" the revenue law. The argument that there is a distinction between claims "arising under" (Judicial Code, Section 24, first) and those "founded upon" (id., Section 24, twentieth) a law of the United States rests on the inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye. * * *.

In *Carriso, Inc.* v. *United States,* 106 F. 2d 707, C. C. A. 9, the plaintiff sued to recover surveyors' fees which the Collector of Customs had collected from it under the supposed authority of a statute which had, in fact, been repealed. The Court of

Appeals, in reversing the District Court's dismissal of the Complaint, said:

> Appellee contends that this is a case sounding in tort, within the meaning of Section 24 (20) of the Judicial Code, 28 U. S. C. A. Section 41 (20), and that, therefore, the District Court had no jurisdiction. This contention, which the District Court upheld, must be rejected. It appears from the complaint that the surveyors' fees in question were exacted of appellant under and pursuant to Section 4186 of the Revised Statutes and were, in fact, the fees therein prescribed. Appellant's claim is that the fees were exacted, not tortiously but illegally, in that they were exacted after Section 4186 had been repealed.
>
> Thus, in effect, appellant claims that the Collector misconstrued and misapplied Section 4186, that is to say, construed it as remaining in effect after it had been repealed, and so, applied it to appellant; and that, therefore, the fees should be refunded. Such a claim does not sound in tort. * * *.

In *Compagnie General Transatlantique* v. *United States,* 21 F. 8d 465, C. C. A. 2, Judge Augustus Hand said, for the court:

> * * *. To limit the recovery in cases "founded" upon a law of Congress to cases where the law provides in terms for a recovery would make that provision of the Tucker Act almost entirely unavailable, because it would allow recovery only in cases where laws other than the Tucker Act already created a right of recovery. "Founded" must therefore mean reasonably involving the application of a law of Congress. * * *.

In *Ross Packing Co.* v. *United States,* 42 F. Supp. 932, Judge Schwellenbach of the United States District Court for the Eastern District of Washington, Southern Division, said:

> There can be no doubt as to the similarity between the Carriso case and this one. In each the Government received money to which it was not entitled. There, the official misconstrued the law by construing it to be in effect after it had been repealed. Here, the Board misconstrued the law by construing that it had power to inflict a penalty on the plaintiff. In neither case was there any compulsion brought upon the plaintiff to make payment except the necessity of complying with an order of a legally constituted government official or agency. In each case the act of the government's agents was illegal. Clearly, if the acts of the Collector in the Carriso case were not tortious, then the action of the Board here was not tortious. There can be no essential difference between an act which is unauthorized because the power to do it has been repealed and one which is unauthorized because such power was not given by the law in the first place.

We have quoted at length from the cases because we think they show a feeling of impatience, which we share, on the part of courts when confronted with situations where the Government has the citizen's money in its pocket, and pleads the illegal acts of its officials as an excuse for keeping it there. We think the observation of Mr. Justice Frankfurter in *Keifer & Keifer* v. *Reconstruction Finance Corporation,* 306 U. S. 390, is pertinent, though not directly in point:

> * * * Congress has provided for not less than forty * * * corporations discharging governmental functions, and without exception the authority to-sue-and-be-sued was included. Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope. * * *

We recognize, of course, that the case of *United States* v. *Holland-American Lijn,* 254 U. S. 148, and this court's decision in *Roger B. Wood* v. *United States,* 61 C. Cls. 192, point in the other direction. In the evolution of a principle as fundamental as the one here involved, we think it is not unnatural that the course of development should not be perfectly regular and uninterrupted. From our quotation above from Mr. Justice Holmes' opinion in *Emery, Bird, Thayer Realty Co., supra,* we learn that the result reached there had been arrived at gradually. Our best estimate of the present law is that a claim to recover an illegal exaction made by officials of the Government, which exaction is based upon a power supposedly conferred by a statute, is a claim "founded upon an Act of Congress."

The Government urges that if the collection of the money in question from the plaintiff was wrongful, it was a tort, and therefore outside our jurisdiction under 28 U. S. C. 1491 (5). It has not explained the nature of the tort, and we have difficulty in fitting it into the categories of torts with which we are familiar. It might rather be a claim for damages, "not sounding in tort" of

which Section 1491 (5) gives us jurisdiction. But we do not so decide. We suppose that the exceptions recited in Section 2680 (a) of 28 U. S. C., in the Federal Tort Claims Act, exempts the Government from liability on this claim as a tort claim. If so, the plaintiff's right, if he has one, must be enforced in the instant suit.

We now consider whether our assumption, made in order to pose the question of jurisdiction, was correct, *i. e.,* whether the exaction of the $7,500 from the plaintiff was without legal justification. The plaintiff urges that the purpose of the Shipping Act of 1916 in lodging in the Maritime Administration the authority to grant or deny permission to sell ships to aliens was to foster the merchant marine of the United States, after being assured that our national defense and our foreign policy would not be harmed by the transfer. We think the plaintiff is right. When then, the Maritime Administration had resolved all these questions in favor of the sale, the imposition of the charge of $7,500 seems to have been irrelevant. The Government points to Section 41 of the Act, which section we have quoted above. Taken literally that section would permit the Administration to impose any condition whatever, however irrelevant. The Government does not urge such an interpretation of Section 41. It justifies the charge on the ground that the Maritime Administration had, in 1947, sold the ship here in question to the plaintiff's predecessor in title, on bids which were limited to domestic bidders; that by so restricting the circle of potential purchasers the Government had lost the chance of possibly receiving a higher price from

an alien purchaser; that when the Government in 1951 permitted the plaintiff to take advantage of the higher price of the foreign market, it was right, that the Government should get some reimbursement for the sacrifice which it had made when it sold the ship in 1947.

We think that the reason the offer of the sale of the ship in 1947 was limited to domestic bidders was not to enable some domestic bidder to acquire the ship at a low price. It was so limited because the Maritime Administration was, at that time, unwilling that the ship should be sold to an alien at any price. By 1951, the reasons for this restriction were no longer present and the Maritime Administration was willing that the ship should be sold abroad. The price had nothing to do with either the restriction in 1947, or its removal in 1951. The $7,500 charge still seems to us to have been irrelevant.

The communications of the Maritime Administration to the plaintiff, denying his claim to the refund of his money, speak of the money as having been paid for the release of the plaintiff from the obligation to operate the ship only under United States registry or enrollment or license. They speak of the payment as a consideration for the release of the plaintiff from a contract. We see no contract in this situation. Section 9 of the Shipping Act of 1916 prescribed the conditions under which a purchaser of a ship from the Government could operate it. There was nothing contractual about it. It was the law. Section 41 provided that the owner of such a ship could sell it to an alien if the Maritime Administration gave its consent. We see nothing in

these provisions which justifies the requirement of a money payment for that consent to the transaction.

The Government says that the plaintiff is estopped to claim the refund of his $7,500 because, by paying it, he got the permission he wanted and completed his sale. Having received an advantage from making the payment, he should not now, the Government says, be permitted to question its legality. We see nothing in this contention. We find it hard to imagine a case where the Government can take a citizen's money, by refusing him something to which he is entitled, and then keep the money on the ground of estoppel. This defense is beneath the dignity of the Government.

The plaintiff's motion for a summary judgment is granted. He may have a judgment for $7,500.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

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